No. 80-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THOMAS S. LEONHARD, et al.,

Petitioners,

against

UNITED STATES OF AMERICA, et al.,

Respondents.

BRIEF FOR STATE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

Do the petitioners, their children and their natural father, have any actionable claim against the State respondents, who released a prisoner into federal custody in connection with a plan to use his testimony to secure certain convictions, resulting in his obtaining a new identity for himself and the mother of the said children and for them as well, and in the petitioner father's loss of visitation and other parental rights during such period?

If there is any such claim is it barred by the Statute of Limitations and the Eleventh Admendment?

Opinions Below

The opinion of the Court of Appeals, dated August 28, 1980, which affirms the District Court, is reported at 633 F. 2d 599, and it appears in the petition in Appendix "A", at pp. A-8 *et seq.*

The opinion of the District Court, dismissing the claims against the State defendants, is dated October 25, 1979, is not officially reported and is printed in Appendix "A" at pp. A-72 *et seq.*

Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Statement of the Case

Defendant Calabrese was released from the custody of the New York State Department of Correctional Services upon the granting of his absolute discharge by the state agency defendants. Prior to his discharge in the late 1960's Calabrese was in state custody following his conviction for robbery.

Subsequent to his release, Calabrese joined the Federal Witness Protection Program and, as agreed, he, Rochelle Leonhard and her three children received new identities and were relocated in exchange for his cooperation with federal authorities.

In order to safeguard the welfare of the relocated parties, plaintiff Leonhard was unable to see his children during the period from 1967 to 1975.

Plaintiffs filed a complaint with the United States District Court for the Western District of New York seeking declaratory relief, injunctive relief and monetary damages

against defendants. Upon motions to dismiss brought pursuant to Rule 12 of the Federal Rules of Civil Procedure, the District Court (*Burke*, J.) granted the motions and dismissed the complaint.

The United States Court of Appeals, Second Circuit, subsequently affirmed the denial of all claims.

ARGUMENT

Petitioners present no grounds for certiorari.

I. Petitioners' Claims Do Not Rise to a Constitutional Level.

The substance of the complaint filed against the New York State Department of Correctional Services, New York State Board of Parole, Benjamin Ward and Eugene Hammock* is that the two latter parties released defendant Calabrese from a New York State Correctional Facility allegedly in violation of the authority and rules of the Parole Board. However, since this claim does not rise to the level of a constitutional violation, the claim is not cognizable by the Supreme Court.

In order to state a valid claim under 42 U.S.C. § 1983, one must show the deprivation of a federally protected constitutional right. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970). The release of a state prisoner by state authorities is, however, a state matter, and in no way can it be construed as a violation of federally protected right. (Moreover, Calabrese's release was clearly proper under New York State law. Corrections Law, § 281, paragraph 3, in effect at the time of the release, authorized "absolute release and discharge".)

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* The suit was brought naming *inter alia* Ward and Hammock and their "predecessors in office." At the time of the release of Calabrese, from State custody in 1968, Neither Ward nor Hammock held the public office that he held at the time of the commencement of this suit in 1978.

This Court has held that the possibility of parole release is an interest which is not necessarily entitled to due process protection. *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex, et al.*, 442 U.S. 1 (1979). The Second Circuit, in construing *Greenholtz* in *Boothe v. Hammock*, 605 F. 2d 661, 663, 664 (2d Cir. 1979), found that although a state's statutory scheme for determining parole release can create a protectible expectation of parole, New York's parole provisions do not establish such a scheme. While guidelines are used to structure the exercise of discretion (see New York Executive Law § 258-c4 [McKinney Supp. 1978]), no entitlement to release is created.

Since there is no constitutional protection of parole release in New York, such a release is not reviewable by the Supreme Court. Moreover, decisions of the Executive Branch do not automatically invoke due process protection; "there simply is no constitutional guarantee that all executive decision making must comply with standards that assure error-free determinations. This is especially true with respect to the sensitive choices presented by the administrative decision to grant parole release." *Greenholtz* v. *Nebraska, supra* at 7.

If plaintiffs were injured by the release of Calabrese, such injury would *not* be proximately related to the State defendants' actions, nor could such an injury be foreseen. Therefore, the District Court was correct in dismissing the complaint against the State defendants on the ground that the complaint alleges no cause of action upon which relief can be granted pursuant to 42 U.S.C. § 1983, and the Second Circuit was correct in affirming that judgment.

II. Petitioner Leonhard's Suit Is Time-Barred.

Leonard asserts that his cause of action is not time-barred. It is well established that in order to ascertain the statute of limitations applicable to a claim made pur-

suant to 42 U.S.C. § 1983, one must look to the most appropriate state statute of limitations. *Board of Regents* v. *Tomanio*, 446 U.S. 478, (1980); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462, (1980); *Taylor* v. *Mayone*, 626 F. 2d 247 (2d Cir. 1980); *Quinn* v. *Syracuse Model Neighborhood Corporation*, 613 F. 2d 438, 449 (2d Cir. 1980). Therefore, the statute of limitations under 42 U.S.C. § 1983 is the three year period under New York Civil Practice Law and Rules § 214(2).

The doctrine of fraudulent concealment which could toll the limitations period is inapplicable to the State defendants. Since Calabrese's release was always a matter of public record and the State never tried to conceal any facts surrounding the release, plaintiff Leonhard was aware of all the essential elements of his claim at the time of the release ten years ago. *Briley* v. *California*, 564 F. 2d 849 (9th Cir. 1977); *Competitive Associates, Inc.* v. *Fantastic Fudge, Inc.*, 58 F.R.D. 121 (D.C.N.Y. 1973).

Also inapplicable to the State defendants is the "continuous wrong" argument used in claiming a tolling of the statute of limitations. The alleged wrongdoing by these defendants was complete upon the release of Calabrese. In short, the time lapse of more than ten years between the accrual of the cause of action against the State defendants and the commencement of the instant suit renders plaintiff Leonhard's suit time-barred.

III. The Eleventh Amendment Bars Maintenance of Petitioners' Suit.

It is well established that the Eleventh Amendment bars a suit against an unconsenting state or its agencies. *Quern* v. *Jordan*, 440 U.S. 332 (1979); *Alabama* v. *Pugh*, 438 U.S. 781 (1978); *Edelman* v. *Jordan*, 415 U.S. 651 (1974). This principle was reaffirmed in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), in which the Court avoided, at footnote 54, any holding bringing

states within the sphere of 42 U.S.C. § 1983 or overruling the Eleventh Amendment precedents concerning states.

The named defendants are state agencies which are merely functional expressions of the sovereign and state officials who at the time of the release of Calabrese did not hold those public officers. Therefore, plaintiff's claim, if allowed, amounts to the suing of the State directly for damages. In such a case, the State is entitled to invoke its sovereign immunity from suit. *Ford Motor Company* v. *Department of Treasury,* 323 U.S. 459, 464 (1945). Furthermore, plaintiffs never alleged consent to this suit by the State or its agencies, as is required. *Edelman* v. *Jordan, supra,* at 672-673.

IV. The Petitioners Allege No Personal Involvement by the State Defendants.

Nowhere in the complaint is there any indication that the State defendants were personally involved in the events complained of, or even had personal knowledge of these incidents. There is no specific allegation that any of these defendants participated in the removal or concealment of the children from Leonhard. Any connection between Calabrese's release and the injuries alleged, assuming that there is such a connection, is too tenuous to support a claim against the State defendants. See *Martinez* v. *California,* 444 U.S. 277 (1980).

The plaintffs attempt to impose liability on the theory that some of the individual defendants occupied high positions of authority must be rejected. The doctrine of *respondeat superior* does not apply in a civil rights action and may not be invoked to circumvent the "personal involvement" requirement. *Rizzo* v. *Goode,* 423 U.S. 362, 375-376 (1976); *Johnson* v. *Glick,* 481 F. 2d 1028, 1033-34 (2d Cir.), *cert. den.,* 414 U.S. 1033 (1973). It is the rule that an official will not be held liable in a civil rights action unless he directly participated in the alleged wrongful conduct.

V. The Petitioners Have Failed to Adequately Present Reasons for the Supreme Court to Issue a Writ of Certiorari.

Rules 17 and 19 of the Rules of the Supreme Court serve as a guide for lawyers in deciding whether to file a petition for certiorari. They state the primary reasons which will be considered by the Court. While the standards outlined are neither controlling nor fully indicative of the Court's discretion, they indicate the character of reasons which will compel consideration of a petition.

As shown by the discussion above, there is no substantial federal question involved in this case. Neither do the plaintiffs allege a conflict between the decisions of two courts. In short, the plaintiffs, in their complaint, have not met the suggested guidelines of the Supreme Court Rules.

Since the Eleventh Amendment provides absolute immunity to the New York State Board of Parole and the New York State Department of Correctional Services, the complaint against those two agencies was properly dismissed. Because the doctrine of *respondeat superior* does not apply to Ward and Hammock and they are insulated from § 1983 liability, the complaint against them was properly dismissed. There were proper alternative grounds for dismissal as well, as we have shown, but these grounds alone are dispositive.

CONCLUSION

For the above reasons, the Court should deny the petition for certiorari.

Dated: New York, New York
February 9, 1981

Respectfully submitted,

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